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No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, Secretary of Labor, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION

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QUESTION PRESENTED

Did the D.C. Circuit correctly apply this Court's decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), when it severed an unconstitutional one-house veto from a statute after finding that "there is not a shred of evidence that the veto provision was deemed to be a vital feature" of that statute? Appendix to Petition ("Pet. App.") at 28a.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The D.C. Circuit Properly Applied This Court's Holding In *Chadha* 2

II. The Decision Of The D.C. Circuit Does Not Conflict With The Decisions Of Other Circuit Courts 4

III. The D.C. Circuit Did Not Exclude From Consideration Evidence That Congress Might Have Passed A Different Bill Absent A Veto Provision 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases: Page

Alaska Airlines, Inc. v. Donovan,
766 F.2d 1550 (D.C. Cir. 1985) ..... *passim*

Alaska Airlines, Inc. v. Donovan,
594 F. Supp. 92 (D.D.C. 1984), *rev'd,*
766 F.2d 1550 (D.C. Cir. 1985) 5

Buckley v. Valeo,
424 U.S. 1 (1976) (per curiam) 3

Champlin Refining Co. v. Corporation Commission,
286 U.S. 210 (1932) 3, 4

EEOC v. CBS, Inc.,
743 F.2d 969 (2d Cir. 1984) 4

Immigration and Naturalization Service v. Chadha,
462 U.S. 919 (1983) ..... *passim*

McCorkle v. United States,
559 F.2d 1258 (4th Cir. 1977), *cert. denied,*
434 U.S. 1011 (1978) 4

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Respondent Association of Flight Attendants files this opposition to the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The challenged decision to sever a one-house veto flowed correctly, inevitably and explicitly from this Court's severability analysis in *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983), since the Court of Appeals found that "there is not a shred of evidence that the veto provision was deemed to be a vital feature" of the statute in question. Pet. App. at 28a. Where, as here, a

legislative veto is of trivial interest to Congress, severability is the only conclusion that can be reached under *Chadha*.

In asking whether Congress would have preferred no bill to the bill without the veto, a question which Petitioners contend is invalid, the D.C. Circuit simply asked the practical question that was explicitly asked in *Chadha*, namely, would Congress have preferred a return to private immigration bills, the consequence of voiding the entire statute, or the bill without the veto? *Chadha, supra,* 462 U.S. at 934.

Rather than reformulating *Chadha* and excluding evidence that Congress might have preferred a different bill, as Petitioners allege, the D.C. Circuit simply found no such evidence of Congressional intent. Petitioners' quarrel rests with the Court of Appeals' interpretation of the legislative history, and this case therfore raises no important issues about the meaning of *Chadha*.

ARGUMENT

I. The D.C. Circuit Properly Applied This Court's Holding in CHADHA.

The petition for a writ of certiorari should be denied since the decision of the Court of Appeals involves little more than the mechanical application of the severability analysis in *Chadha* to the legislative history of a law containing a legislative veto. Although Petitioners argue that the D.C. Circuit radically departed from *Chadha,* the Court of Appeals explicitly applied *Chadha's* severability analysis. Pet. App. at 15a, 16a, 17a. That analysis requires that "the invalid portions of a statute are to be severed " '(u)nless it is evident that the legislature would not have

enacted those provisions which are within its power independently of that which is not.' " *Chadha, supra,* 462 U.S. at 931-32, quoting *Buckley v. Valeo,* 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co. v. Corporation Commission,* 286 U.S. 210, 234 (1932).

After a careful examination of the legislative history, an examination which considered but rejected Petitioners' arguments concerning the intent of Congress, the Court of Appeals concluded that the veto could be severed because "there is not a shred of evidence that the veto provision was deemed to be a vital feature" of the challenged statute. Pet. App. at 28a. Such a finding of severability flows inevitably in any case where a court finds a one-house veto to be of trivial interest to Congress, and the D.C. Circuit's decision is therefore unremarkable.

Petitioners contend that the Court of Appeals departed from *Chadha* by requiring those wishing to show inseverability to prove that "it is evident that Congress would have preferred no . . . provision at all to the existing provision *sans* the veto provision." Pet. App. at 19a. Yet this standard merely rephrases *Chadha* and states that, realistically, a court has two choices when confronted with a statute. It can strike down a law altogether, or uphold it without the veto. Which of these choices, based on the legislative history, would Congress have preferred?

The question of whether Congress would have preferred no bill at all, the question which Petitioners claim is inappropriate, appears at the very heart of this Court's analysis in *Chadha.* For in finding severability, this Court placed great emphasis on the fact that "there is insufficient evidence that Congress would have continued to subject itself to the onerous burden of private bills had it known that §244(c)(2) would be held unconstitutional." *Chadha,*

supra, 462 U.S. at 934. In other words, there was insufficient evidence in *Chadha* that Congress would have preferred no bill at all, which would have meant a return to private bills to prevent deportation. This is the precise conceptual question formulated by the D.C. Circuit.

II. The Decision Of The D.C. Circuit Does Not Conflict With The Decision Of Other Circuit Courts.

Petitioners' argument that the D.C. Circuit is in conflict with Supreme Court precedent and the decisions of other circuits is simply wrong. For example, Petitioners state that the truly "relevant issue of legislative intent is whether 'the legislature would have been satisifed with what remained.' " Petition at 13, quoting *Champlin Refining Co. v. Corporation Commission,* 286 U.S. 210 (1932). Yet the D.C. Circuit has done nothing more than ask whether Congress would have been satisfied with what remained or whether it would have preferred to have the bill invalidated by the courts. Congress would have been satisfied in this case, of course, because it "expressed relatively little concern about the veto provision." Pet. App. at 19a.

Similarly, the Petitioners argue that the D.C. Circuit's holding is inconsistent with the holdings of inseverability in, for example, *EEOC v. CBS, Inc.,* 743 F.2d 969 (2d Cir. 1984) and *McCorkle v. United States,* 559 F.2d 1258 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978). But since it is abundantly clear on the facts of those cases, as interpreted, that Congress would *not* have preferred to give the President unfettered power to reorganize the executive branch or set salaries, it is clear that the D.C. Circuit would have reached the same result of inseverability for the same reasons. As the concurring opinion in the D.C.

Circuit states, the issue is always one of "(giving) effect to the dominant intent of Congress." Pet. App. at 29a.[1]

III. The D.C. Circuit Did Not Exclude From Consideration Evidence That Congress Might Have Passed A Different Bill Absent A Veto Provision.

Petitioners suggest that the real damage resulting from the "new" standard adopted by the D.C. Circuit is that it led the Court of Appeals to reject "as irrelevant evidence that Congress would have preferred a different form of employee protection if it had known that certain provisions in the program it enacted were invalid." Petition at 2. An examination of the opinion, however, reveals that the Court of Appeals carefully considered all the Petitioners' arguments that a different bill might have been approved without the veto, and simply found these arguments unpersuasive. While Petitioners believe that the conference report provided crucial evidence that Congress would have preferred a different bill, the Court of Appeals looked at the same evidence and concluded that there is "no evidence that the House's agreement to the Senate version of the

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[1]Petitioners' survey of Supreme Court cases and the decisions in the circuit courts provides little support for the District Court's holding that severability requires proof that Congress would not have changed a word in a bill if it had written it without the veto. Pet. App. at 33a n.3. The problem with the District Court's decision is not so much its invitation to a scholastic debate on the difference between Congressional desire for *the* bill versus *the identical bill* versus *some* bill, but the fact that the District Court has subtly shifted the standard of proof. Under *Chadha,* those challenging a statute must prove that it is evident that Congress would not have passed the bill *sans* veto. Under the District Court's view the burden is on those trying to save the bill to show that Congress would have passed the identical bill without the veto.

protection plan was given in exchange for beefing up the veto device," and added that "(n)or have we found any indication that the Senate's agreement to the minor modifications in its version of the plan was premised on a 'strengthening' of the veto provision." Pet. App. at 27a, 28a. As can be seen, the D.C. Circuit did not state that evidence of a desire for a different bill is irrelevant. It simply said that there was no such evidence in the legislative history. Petitioners' argument, ultimately, is not with the standard of severability but with the D.C. Circuit's interpretation of the legislative history. That interpretation is not appropriate for this Court's review under Supreme Court Rule 17.[2]

[2]In a footnote, Petitioners argue that this case should have been brought directly to the Supreme Court from the District Court, a contention thoroughly addressed by the Court of Appeals. Pet. App. at 6a-9a. It is interesting to note that when one intervenor, Brotherhood of Railway and Airline Clerks, *et al.*, ("BRAC"), applied for a stay of the District Court decision in the Supreme Court, the Petitioners argued against it stating that: "Despite BRAC's attempt to cast Judge Gesell's ruling as a decision on constitutional issues . . . the decision in fact did nothing more than apply well-established principles of statutory construction to a particular provision of the Airline Deregulation Act. . . ." Appellee's Opposition to Appellants Application for Stay of Order and Final Judgment at 2, 3 (May 22, 1984) in *Brac v. Alaska Airline, Inc.* (No. A-947).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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